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SECURITIES AND EXCHANGE COMMISSION  
[Release No. 34-70990; File No. SR-MSRB-2013-08]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change Consisting of Amendments to MSRB Rule G-11, on Primary Offering Practices, Relating to Changes in a Bond Authorizing Document

December 5, 2013.

I. Introduction

On September 19, 2013, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change consisting of amendments to MSRB Rule G-11, Primary Offering Practices, relating to consents to changes in a bond authorizing document. The proposed rule change was published for comment in the Federal Register on October 22, 2013.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The MSRB states in the Notice that municipal entity issuers (“issuers”) or bond owners often request amendments to bond authorizing documents in order to modernize outdated provisions or address other concerns that have arisen after the initial issuance of bonds. These amendments are typically achieved by the consent of owners of a specified percentage of the aggregate principal amount of bonds, as determined by the authorizing document. The MSRB asserts that the process of obtaining consents from bond owners and related costs can be significant because the identity of beneficial owners of bonds is frequently unknown to issuers

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 70607 (October 3, 2013), 78 FR 62736 (“Notice”).

and trustees.<sup>4</sup> To address some of these burdens, issuers frequently have requested underwriters, as temporary owners of bonds during the initial distribution period and representing the aggregate principal amount of bonds underwritten, to provide consents to amendments to authorizing documents. According to the MSRB, this allows issuers to avoid the potential cost and delay of obtaining, by direct solicitation, consents from beneficial owners. However, according to the MSRB, this approach may result in a dealer consenting to changes to authorizing documents that adversely affect the interests of existing bond owners.<sup>5</sup>

The MSRB proposes to amend MSRB Rule G-11, Primary Offering Practices, to prohibit brokers, dealers and municipal securities dealers (“dealers”) from providing consents to any amendment to authorizing documents for municipal securities, either as an underwriter, a remarketing agent, or as agent for or in lieu of bond owners, except in certain limited circumstances set forth in proposed section (l) of Rule G-11.<sup>6</sup>

Subparagraph (l)(i)(A) will except from the prohibition an underwriter that provides bond owner consents to changes in authorizing documents if such documents expressly allowed an

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<sup>4</sup> The MSRB states that many municipal securities are issued in book-entry form and registered as a single “global” certificate in the name of a depository. Thus, the identity of beneficial owners of the bonds is frequently unknown to issuers and trustees. Additionally, the MSRB states that identifying such owners and obtaining consents often results in cost and delay in achieving the requisite number of consents.

<sup>5</sup> The MSRB represents, that while existing bond owners may be considered as having agreed to provisions relating to amendments to the authorizing documents at the time of purchase, such bond owners are not likely to have anticipated that a dealer, acting as an underwriter or remarketing agent with no prior or future long-term economic interest in the bonds, could provide such consent unless such ability had been specifically authorized in the authorizing documents and disclosed to bond owners.

<sup>6</sup> The MSRB notes that consents from dealers solely in their capacity as an underwriter or a remarketing agent and required or permitted in connection with their administrative duties under authorizing documents are not subject to the proposed rule change. Further, the MSRB notes that the proposed rule change does not affect other methods used by issuers to obtain consents from owners of newly issued bonds, such as consents received from bond owners upon initial purchase of the bonds.

underwriter to provide such consents and the offering documents for the issuer's existing securities expressly disclosed that consents could be provided by underwriters of other securities issued under the same authorizing documents.

Subparagraph (l)(i)(B) will except from the prohibition a dealer that owns the relevant securities other than in the capacity of an underwriter or a remarketing agent. The MSRB states that the determination of whether a dealer owns the securities for purposes of this exception will depend on whether it purchased such securities without a view to distribution.

Subparagraph (l)(i)(C) will except a dealer acting as a remarketing agent to whom the relevant securities had been tendered as a result of a mandatory tender, provided that all securities affected by the amendment (other than securities retained by an owner in lieu of a tender and for which such bond owner had delivered consent) had been tendered. If a bond owner elects to exercise its right to "hold" bonds subject to a mandatory tender in lieu of tendering, the remarketing agent will be prohibited from providing consents to any amendment to an authorizing document unless it also receives the specific written consent of such bond owner to such change.

Subparagraph (l)(i)(D) will except a dealer that provides consent to changes to authorizing documents solely as agent for and on behalf of bond owners that delivered separate written consents to such amendments. An underwriter providing an "omnibus" consent under this subparagraph will not be viewed as substituting its judgment for that of bond owners but rather as an agent facilitating the collection and delivery of consents.

Subparagraph (l)(i)(E) will except a dealer, in its capacity as an underwriter, that provides consent on behalf of prospective purchasers to amendments to authorizing documents if the amendments would not become effective until all existing bond owners affected by the proposed

amendments (other than the prospective purchasers for whom the underwriter had provided consent) had also consented.<sup>7</sup>

Lastly, paragraph (l)(ii) will define certain terms for purposes of proposed section (l), specifically the terms “authorizing document,”<sup>8</sup> “bond owner,”<sup>9</sup> and “bond owner consent.”<sup>10</sup>

### III. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change and finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder.<sup>11</sup> In particular, the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which provides that the MSRB’s rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster

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<sup>7</sup> The MSRB states that this exception recognizes a limited circumstance in which an underwriter’s consent to amendments to authorizing documents, provided in lieu and on behalf of new purchasers of bonds, will be permitted. In this case, the underwriter’s consent will not become effective until existing owners of all bonds (other than the prospective purchasers for whom the underwriter had provided consent) affected by such amendment and outstanding at the time such consent became effective had also provided consent. The MSRB states that this alternative might be considered when an issuer was in the process of accumulating consents from all owners of outstanding bonds and had not completed acquiring the consents prior to issuing a new series of bonds. In that case, an underwriter’s consent on behalf of new purchasers would not become effective until all other bond owners affected by the amendment had also provided their consent and such other consents were currently effective. The MSRB represents that this exception would not affect an underwriter’s ability to provide consents as permitted in subparagraph (l)(i)(D) of the proposed rule change.

<sup>8</sup> The MSRB defines the term “authorizing document” to mean the trust indenture, resolution, ordinance, or other document under which the securities are issued.

<sup>9</sup> The MSRB defines the term “bond owner” as the owner of municipal securities issued under the applicable authorizing document.

<sup>10</sup> The MSRB defines the term “bond owner consent” to mean any consent specified in an authorizing document that may be or is required to be given by a bond owner pursuant to such authorizing document.

<sup>11</sup> In approving the proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.<sup>12</sup>

The Commission believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, because it should protect investors by prohibiting consents to amendments to authorizing documents from a dealer who may be only the temporary owner of the bonds and thus may not share a bond owner's prior or long-term economic interest in the bonds, except under limited circumstances set forth in the rule. The Commission notes that the exceptions in the rule to allow dealer consent to changes in authorizing documents are limited in nature so as to protect existing bond holders, while addressing concerns of issuers about obtaining consents to amendments of their authorizing documents in certain situations. In addition, the Commission believes that the proposed rule change will enhance transparency regarding the practice of obtaining bond owner consents from dealers.

At the same time, the Commission notes that the MSRB has represented that the proposed rule change does not grant an affirmative right to dealers to provide consents to changes to authorizing documents and does not alter the dealer's obligations applicable under other MSRB rules, including its fair dealing obligations under Rule G-17. Accordingly, dealers may not simply rely on the exceptions prescribed in the rule but rather are obligated to consider and comply with their Rule G-17 obligations in seeking to provide consents to amendments in authorizing documents at the request of an issuer in accordance with the exceptions provided.

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<sup>12</sup> 15 U.S.C. 78o-4(b)(2)(C).

For these reasons, the Commission believes that the proposed rule change is consistent with the Act.

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB, and in particular, Section 15B(b)(2)(C) of the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-MSRB-2013-08) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Kevin M. O'Neill,  
Deputy Secretary.

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<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).